

**IN THE COURT OF APPEAL OF TANZANIA  
AT ARUSHA**

**(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And MASSATI, J.A.)**

**CRIMINAL APPEAL NO. 280 OF 2015**

**MSAMI ALLY.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania  
at Moshi)**

**(Nyerere, J.)**

**Dated the 23<sup>rd</sup> day of December, 2014**

**In**

**DC Criminal Appeal No. 42 of 2012**

**.....**

**JUDGMENT OF THE COURT**

18<sup>th</sup> & 21<sup>st</sup> July, 2016.

**RUTAKANGWA, J. A.:**

The appellant was arraigned before the District Court of Same District ("the trial court") for raping one Claudiana d/o Juma on the 1<sup>st</sup> day of March, 2011. Upon denying the charge, on 3<sup>rd</sup> March, 2011, a full trial followed.

At the preliminary hearing, held on 17<sup>th</sup> March, 2011, by S. W. Mwalusamba, R.M., the appellant admitted only his name and address as they appeared in the charge sheet. The actual trial commenced on the same day before the same learned Resident Magistrate, who took the

evidence of Claudiana Juma (PW1), Salima Mwarabu (PW2) and Mashauri Hassan (PW3). The hearing was thereafter adjourned to 31<sup>st</sup> March, 2011, when the same magistrate took the evidence of Juma Ismail (PW4). The hearing then stalled on account of various reasons.

When the trial resumed on 1<sup>st</sup> November, 2011, for reasons not apparent in the record of proceedings in the trial court, one G. N. Karwijila, R.M., presided over the trial. The new trial magistrate heard the evidence of the remaining prosecution witness, Dr. Aubrey E. Mushi (PW5) and the defence evidence.

At the end of the trial, the second learned trial Resident Magistrate found the appellant guilty as charged, convicted him and sentenced him to thirty (30) years imprisonment. The appellant was also ordered to pay compensation of Tshs. 100,000/= to PW1 Claudiana.

Aggrieved by the conviction and sentences, he appealed to the High Court at Moshi. His memorandum of appeal listed eight (8) grievances. One of those grievances was that the trial court had committed an error of law in failing to comply with the provisions of section 214 (1) of the Criminal Procedure Act, Cap. 20, R.E. 2002 ("the CPA") (ground of appeal No. 8).

The appeal was unsuccessful, hence this appeal. In disposing of the appeal, the learned first appellate judge conceded that the second trial magistrate:-

*"just continued with the hearing without first complying with the provisions of section 214 of the Criminal Procedure Act [CAP. 20 R.E. 2002...]"*

After reproducing the provisions of section 214 (1) and (2) in full, the learned appellate judge proceeded to reason and conclude thus:-

*"It is not disputed that the trial magistrate who took over the case did not state anything concerning his take over. He did not even explain to the appellant whether he would like to continue with the case partially heard or the case should start afresh. It is the finding of this court that non-compliance with **section 214 (1) (sic) of CPA (supra)** did not prejudice appellant's case, the appellant failed to explain this court how he was prejudiced by the trial magistrate's failure to comply with the above cited provision of law. More so, the wording of the said provision of*

*law talks of "may" which to my considered view is not mandatory but rather discretionary. The trial magistrate ought to consider it or not. Therefore this procedural irregularity is curable under **section 388 of the Criminal Procedure Act** (Cap. 20 R.E. 2002)."*

*[Emphasis supplied].*

The memoranda of appeal to this Court consist of seven (7) grounds of complaint against the judgment of the first appellate court. We have, all the same, found the second ground to be pertinent enough to enable us to dispose of completely this appeal. In this complaint, the appellant is faulting the learned first appellate judge in failing to nullify the proceedings in and the judgment of the trial court on account of flouting the provisions of section 214 (1) of the CPA. He has accordingly pressed us to intervene and set aside the judgment of the two courts below.

Mr. Vicent Njau, learned Senior State Attorney, who appeared before us on behalf of the respondent Republic, supported the appeal. Unlike the learned first appellate judge, he was of the firm view that the failure by the second trial Resident Magistrate to inform the appellant of

and record the reasons why he was taking over the trial from the first trial Resident Magistrate, was a fatal irregularity and as such incurable under section 388 of the CPA. He accordingly pressed us to invoke our powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 ("the AJA"), to nullify, quash and set aside the proceedings before the second trial Resident Magistrate as well as his judgment. He also urged us to quash and set aside the proceedings before the High Court as well as its judgment, and remit the record to the trial court for continuation of the trial from the date the second magistrate took over, that is, the 1<sup>st</sup> of November, 2011 after complying with the provisions of section 214 (1) of the CPA. As authority for his stance, he referred us to the decision of this Court in **Omari Juma v. R.**, Criminal Appeal No. 413 of 2015 (unreported).

In the light of the above undisputed facts, we are of the settled minds that this appeal is not wanting in merit. As correctly pointed out by Mr. Njau, we are of the firm view that non-compliance with the provisions of section 214 (1) of the CPA, in the manner exhibited by the learned second trial Resident Magistrate in this case, is a fatal irregularity. For this reason, we respectfully find ourselves constrained to differ with the learned first appellate judge when she held that the non-

compliance was curable under section 388 of the CPA. The jurisprudence on this is well settled.

In the case of **Priscus Kimaro vs. R.**, Criminal Appeal No. 301 of 2013 (unreported), this Court held thus:-

*"... where it is necessary to reassign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete must be recorded. If that is not done, it must lead to chaos in the administration of justice. Anyone, for personal reasons could pick up any file and deal with it to the detriment of justice. This must not be allowed."*

We find this to be a sound reason and subscribe wholly to it, as was done by this Court in **Ramadhani Mohamed and Ndalule Selemani v. R.**, Criminal Appeal No. 59 of 2011 (unreported).

Furthermore, in the case of **Abdi Masoud @ Iboma and Three Others v. R.**, Criminal Appeal No. 116 of 2015 (unreported), the Court succinctly emphasized that:-

*"In our view, under section 214 (1) of the CPA, it is necessary to record the reasons for*

*reassignment or change of trial court magistrates.*

*It is a prerequisite for the second magistrate's assumption of jurisdiction. If this is not complied with, the successor magistrate would have no authority or jurisdiction to try the case."*

It is for this clear reason that the Court in **Adam Kitundu v. The Republic**, Criminal Appeal No. 360 of 2014 (unreported) unequivocally held that where a successor magistrate proceeds with the case without stating clearly the reasons, the "***proceedings before him are a nullity***". [See, also, **Exavery Julius Mwarusha v. R.**, Criminal Appeal No. 236 of 2014 (unreported)].

The Court went further in the case of **Ally Juma Faizi @ Mpemba and Ally Ramadhani @ Dogo v. R.**, Criminal Appeal No. 401 of 2013 (unreported) to lucidly hold that:-

*"Non-compliance with the provisions of section 214 in the matter before us rendered the whole proceedings from the trial court through the High Court a nullity."*

We took the same stance in the case of **Omary Juma v. R.**, (*supra*) wherein we notably held thus:-

*"In the absence of reasons for the change of the trial magistrate, the successor magistrate, was in our view, not vested with jurisdiction to proceed with the trial, consequently, the proceedings before the successor magistrate without reasons being assigned for the takeover, were a rendered a nullity."*

Faced with this sea of authorities, we have found ourselves wanting in temerity to hold that failure to comply with the provisions of section 214 (1) of the CPA was a curable irregularity under section 388 of the CPA. It was, in our respectful view, fatal and rendered the proceedings before the successor magistrate, who heard only one prosecution witness, a nullity. All the same, we are alive to the fact that under the scheme of section 214 (1) of the CPA, the successor magistrate is not strictly bound to have the accused person's opinion on whether or not "the case should start afresh". It is entirely within his or her discretion to so order depending on the peculiar circumstances of each case.

Having found the proceedings before the successor magistrate a nullity, we are enjoined by law to quash them together with the resultant



judgment and set them aside, which we hereby do. As the proceedings in the first appellate court were premised on partly void proceedings and judgment of the trial court, we invoke our revisional powers under section 4 (2) of the AJA to quash and set them aside. We remit the record to the trial court to it to proceed with the trial from the stage it had reached on 1<sup>st</sup> November, 2011, after complying fully with the provisions of section 214 (1) of the CPA as expounded in the authorities cited above, if the first magistrate has ceased to have jurisdiction over the matter. In case of conviction, the time served by the appellant as a convict should be deducted from the sentence to be imposed. In the meanwhile the appellant should be held in custody as a remand prison until his trial which should be given first priority by the trial court.

In fine, we allow this appeal.

**DATED at ARUSHA** this 19<sup>th</sup> day of July, 2016.

E. M. K. RUTAKANGWA  
**JUSTICE OF APPEAL**

E. A. KILEO  
**JUSTICE OF APPEAL**

S. A. MASSATI  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



E. F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**